

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION TWENTY-FIVE

Indianapolis, Indiana

HAPPE & SONS CONSTRUCTION, INC.
Employer,

and

Case 25-RC-10053

LOCAL UNION NO. 561, LABORERS'
INTERNATIONAL UNION OF
NORTH AMERICA, AFL-CIO
Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employers are engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.
3. The labor organization involved claims to represent certain employees of the Employers.
4. A question affecting commerce exists concerning the representation of certain employees within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time laborers and other construction employees employed by the Employer at its Evansville, Indiana facility; but excluding all plumbers and plumber helpers/apprentices, the Marketing Director, all Project Managers and other supervisors within the meaning of the Act, all managerial employees, office clerical employees, and all other employees.

I. STATEMENT OF FACTS

Happe & Sons Construction, Inc. (hereinafter referred to as Happe), an Indiana corporation with a principal place of business located in Evansville, Indiana, is a general contractor in the construction industry engaged in commercial, industrial and residential new construction and remodeling. The Company employs a total workforce of 43 persons and has been in existence since 1987. The Company acts as a general contractor, and performs such work as earth moving, carpentry, bricklaying, masonry and cement finishing, roofing, and drywall hanging and painting. It performs no electrical or HVAC work (heating, ventilation and air-conditioning).

The Petitioner, Local Union No. 561, Laborers' International Union of North America, AFL-CIO, seeks an election within a unit comprised of approximately 15 employees whom it contends perform laborer functions.¹ The Employer asserts that the only appropriate unit is a wall-to-wall unit encompassing all of its construction employees. It asserts that it makes no distinction among the types of work its employees perform, and they all perform laborer functions.

The unit found appropriate herein consists of approximately 30 employees for whom no history of collective bargaining exists.

The Employer performs work primarily within Evansville, Indiana and a 75 mile radius. Its office and principal facility is located in Evansville with its equipment yard, mechanic bays and tool room located about ½ block away. The Employer is owned by three brothers, at least two of whom play an active role in the day-to-day management of the Company. One brother is President; another is Vice President; and their father is General Manager, although not an owner. Three Project Managers who oversee the construction projects in conjunction with the General Manager, report to the General Manager and officers of the corporation. The parties stipulated at hearing that the Project Managers are statutory supervisors,² and accordingly, they are not included in the unit found appropriate herein. When more than one employee is assigned to a project, a crew member may be designated as the foreman of the project. No one works as a

¹ The Petitioner amended its petition at hearing to restrict the unit sought from that of "all employees" to "all laborers."

² The Project Managers possess the authority to assign work to employees.

foreman on a regular basis, and an employee assigned to be a foreman on one project may not be assigned this function on the next project. Working foreman receive no additional compensation for any additional responsibilities they may have. The parties are in agreement that working foreman are not supervisors within the meaning the Act, and record evidence supports this conclusion.

It is the Employer's position that only a unit comprised of all its construction employees is appropriate because all of its employees perform a wide range of functions, and no distinct and readily identifiable group of "laborers" exists. All of its employees, it asserts, perform laborer work. For the most part, the evidence supports this contention.

According to the Company's President, it does not assign job classifications or job titles to its employees because they all perform a variety of construction functions. For purposes of the hearing, however, the Employer's President grouped its employees within seven broad classes:

- 20 employees: Laborer/Carpenter Helper/Carpenter
- 3 employees: Laborer/Equipment Operator/Carpenter
- 4 employees: Laborer/Painter/Drywall Finisher
- 4 employees: Laborer/Plumber
- 1 employee: Laborer/Mechanic
- 1 employee: Laborer/Carpenter/Masonry
- 1 employee: Laborer/Carpenter Helper/Delivery Driver.

At hearing the Petitioner identified 15 employees whom it asserts should be included within a laborer unit, based upon the Petitioner's observations of work performed by employees on one or more of the Employer's job sites, along with conversations the Petitioner has had with some of the Employer's employees. The Petitioner defines a laborer as one who performs unskilled work and/or one who assists skilled workers in the performance of their work. Ten of the individuals the Petitioner identified as potential members of the petitioned unit are employees the Company has labeled "Laborer/Carpenter Helper/Carpenter;" one employee is labeled "Laborer/Equipment Operator/Carpenter," one is "Laborer/Painter/Drywall Finisher;" one is the Employer's sole "Laborer/Carpenter/Masonry" worker; one is the Employer's "Laborer/Mechanic," and the last is the Employer's delivery driver whom it has labeled as "Laborer/Carpenter Helper/Delivery Driver."

Although the Employer asserts that all of its workers are cross-trained in various functions, at hearing the Employer's President acknowledged that certain employees possess historically recognized craft skills. Included in its workforce are employees skilled in plumbing, carpentry, drywall hanging and painting, bricklaying and masonry work, and the operation of heavy equipment. The Employer employs one mechanic whose primary function is to repair and maintain company-owned vehicles and equipment. The mechanic is also in charge of the Employer's tool room and dispenses tools to workers. Another employee performs primarily truck driving functions. When the Employer seeks to hire applicants who possess a special skill, it advertises for such. For example, a few weeks before the hearing herein, it placed

advertisements in a local newspaper seeking "Backhoe Operators – Needed. CDL³ req. 5 yrs. min. exp." Likewise, when it was in need of a bricklayer, it placed an ad reading "Brick/Block Mason – 5 yrs. min exp. Drivers license req." When the Employer seeks entry level applicants with no skills, however, its advertisements contain no skill or experience requirements. Thus, in early August of this year it placed advertisements which read: "Construction Laborers – Drivers license and pre-employment drug screen required." The Employer's President also testified that its skilled employees spend the majority of their work time performing functions within their areas of expertise. The Company's employee handbook also recognizes that certain employees possess trade skills. It states that employees who work in certain "trade positions" are required to provide their own tools. The Employer's range of hourly wages also evidences its recognition of specialty skills. The wages of its current workforce range from \$8.00 to \$20.00 per hour. Among the three Equipment Operators, two earn \$19.00 and \$17.00 per hour, while one earns \$11.25. Its Laborer/Painter/Drywall Finishers' wages range from \$11.75 to \$16.00. Wages of Laborer/Carpenters range between \$8.25 and \$17.00. According to the Employer's President, entry level wages for unskilled employees range between \$8.00 and \$10.00 per hour. Clearly then, the evidence indicates that the Employer recognizes that certain of its employees possess skills and experience greater than others.

At hearing the Employer offered into evidence computer-generated summaries of the daily work performed by its employees, in an apparent effort to show the wide diversity of functions they all perform. The accuracy of these summaries is questionable, however. The summaries were prepared by an office employee from the contents of daily time sheets completed by employees in the field. The Employer provided these employees with a list of coded job functions, and the employees are supposed to select the code which describes the work performed each day. According to the testimony of the sole employee-witness, however, often there is no code which accurately describes the work he has performed. So, he selects a related but inaccurate code. And so, this inaccurate description of his work is reflected on the computer-generated summaries. The employee further testified that some of the work the summaries indicate he has performed - such as carpentry work - he has never performed. Thus, the time sheet summarizes cannot be relied upon as an accurate description of the work performed by employees.⁴

³ Commercial Driver's License

⁴ A week after the close of the hearing the Region received from the Employer, a document entitled "Affidavit of Jeffrey Happe" attached to which were many pages of documents which purport to be copies of employee daily time sheets and which assertedly correspond to the time period covered by the summaries placed into evidence by the Employer at hearing. This prospective new exhibit was not accompanied by a motion to reopen the record or any explanation by the Employer of its failure to have offered the sheets into evidence at the hearing. Following submission of these sheets, however, the Petitioner moved that the record be reopened and that the time sheets be received into evidence, on grounds that the documents are newly discovered evidence. They are not newly discovered. The time sheets were in the Employer's possession at the time of the hearing, and the Petitioner was aware of their existence. Indeed, one of its own witnesses testified about the sheets at the hearing. The Petitioner could have subpoenaed these documents from the Employer and offered them into evidence at the hearing.

With one exception, the record does not permit the identification of those employees who possess craft skills. If such identification were possible, one could reasonably conclude that the remainder of employees are "laborers." According to the Employer, it does not maintain job classifications, job titles, or other means by which an identification of those persons who possess craft skills is possible. The sole exception are the Employer's plumbers who, by state law, must complete an approved apprenticeship program and successfully complete a state examination in order to become a journeyman plumber. State law also requires that all plumbing work on a job site must be overseen by a journeyman plumber. The Employer currently employs two journeyman plumbers and two plumber helpers. None of the Employer's other workers possess journeyman status in any craft. The Employer does not provide, nor does it require that any of its employees participate in any formalized training program as a condition of their employment. Employees are provided on-the-job training only. Although some employees possess OSHA certifications indicating their successful completion of a 10-hour safety program, and others possess certifications to operate power lifts and "powdered actuated" tools, these training programs are not comparable in scope, duration or complexity to the apprenticeship programs which form the bases for journeyman craftsman status.⁵ Thus, other than the plumbers and their helpers, the evidence is insufficient to identify any other group of employees as members of a craft.

In addition to the absence of craft designation, the evidence further indicates that skilled employees are regularly assigned to perform a variety of unskilled functions. This occurs when work within their area of expertise is not available, or when other circumstances dictate. According to the Employer's President, the majority of its jobs are small ones.⁶ The same one or more employees will usually perform all facets of the work required to be performed on the job, from start to finish. Thus, the same employees may perform demolition work such as tearing out a wall; they will hang new drywall; insulate; finish and paint the drywall; add decorate trim; and clean up the job site. Therefore, skilled employees regularly perform some of the same unskilled functions as the 15 individuals the Petitioner considers laborers. Even on projects where skilled employees do not perform laborer functions, they often work together with less skilled employees. The preponderance of evidence therefore indicates that interchange among skilled and less skilled employees is common.

Scheduled work hours for all employees are 8:00 AM to 4:30 PM. All construction employees are eligible to receive the same fringe benefits, including paid holiday and vacations,

There would be little finality to pre-election hearings, where time is of the essence, if parties were permitted to improve shortcomings in their cases at hearing, by tendering additional documentary and testimonial evidence thereafter. Since the Activity Time Sheets are not newly discovered evidence, they and the related affidavits are not received into evidence in this proceeding, and have not been considered by the undersigned in rendering his decision herein.

⁵ In contrast to the four-year program which typifies most apprenticeship programs, training for certification as a lift operator appears limited to a few hours. According to the Employer's President, such training is generally provided its employees either by the rental company from whom a lift is leased, or the company from whom it is purchased. The record does not explain the nature of the "powder actuated" tool training.

⁶ At the time of the hearing, the Employer had 37 projects in progress.

health insurance and a 401(k) retirement program. All employees are provided T-shirts bearing the Employer's name and logo, although wearing them is optional. All employees are subject to the same Employer policies and work rules. They are directly supervised by the Project Managers and indirectly by the General Manager.

II. DISCUSSION

A craft unit is one consisting of a distinct and homogeneous group of skilled journeymen craftsmen who, together with their helpers or apprentices, are primarily engaged in the performance of tasks which are not performed by other employees and which require the use of substantial craft skills and specialized tools and equipment, Burns and Roe Services Corporation, 313 NLRB 1307 (1994). In the case at hand, only the plumbers and their helpers meet this definition. They are the only employees who have completed a formal apprenticeship program; who possess a license; and who have achieved journeyman status in a recognized craft. It cannot be concluded that the Employer's other experienced or skilled employees, although substantially higher paid than some co-workers, also constitute members of crafts, particularly in the absence of their completion of any formal training or apprenticeship program, Boudreaux Drywall, Inc. 308 NLRB 777 (1992).

Based upon the absence of craft membership; the fact that employees who the Petitioner does not seek to include within its petitioned unit often work together and have substantial regular contact with members of the petitioned unit; perform some of the same tasks; share common supervision; are subject to the same employment policies and work rules; work the same hours and are eligible to receive the same fringe benefits as members of the petitioned unit, it is concluded that all construction employees of the Employer, except those employees whom the Employer designated at hearing as "Laborer/Plumbers" share a sufficient community of interest to constitute an appropriate bargaining unit, and accordingly, they shall be included within the petitioned unit.

III. DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the above unit, at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations.

Eligible to vote are those employees who:

(a) were employed within the above unit during the payroll period ending immediately preceding the date of this Decision, or

(b) have been employed for a total of 30 days or more within the above unit within a period of 12 months immediately preceding such eligibility date, or

(c) have been employed within the above unit during the 12 months immediately preceding such eligibility date for less than 30 days, but for at least 45 days during the 24 months immediately preceding such eligibility date, and

(d) have not been terminated for cause or quit voluntarily prior to the completion of the last project for which they were employed.

Those in the military service of the United States may vote if they appear in person at the polls. In addition to those employees who have been terminated for cause or voluntarily quit, also ineligible to vote are those employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and the employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.

Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by Local Union No. 561, Laborers' International Union of North America, AFL-CIO.

IV. NOTICES OF ELECTION

Please be advised that the Board has adopted a rule requiring that election notices be posted by the Employer at least three working days prior to an election. If the Employer has not received the notice of election at least five working days prior to the election date, please contact the Board Agent assigned to the case or the election clerk.

A party shall be estopped from objecting to the non-posting of notices if it is responsible for the non-posting. An Employer shall be deemed to have received copies of the election notices unless it notifies the Regional office at least five working days prior to 12:01 a.m. of the day of the election that it has not received the notices, Club Demonstration Services, 317 NLRB 349 (1995). Failure of the Employer to comply with these posting rules shall be grounds for setting aside the election whenever proper objections are filed.

V. LIST OF VOTERS

To insure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. Excelsior Underwear, Inc., 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Company, 394 U.S. 759 (1969). Accordingly, it is directed that 2 copies of an eligibility list containing the full names and addresses of all the eligible voters must be filed by the Employer with the undersigned within 7 days from the date of this Decision. North Macon Health Care Facility, 315 NLRB 359 (1994). The undersigned shall make this list available to all parties to the election. In order to be timely filed, such list must be received in Region 25's Office, Room 238, Minton-Capehart

Federal Building, 575 North Pennsylvania Street, Indianapolis, Indiana 46204-1577, on or before **September 13, 2001**. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

VI. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099-14th Street. N.W., Washington, DC 20570. This request must be received by the Board in Washington by September 20, 2001.

DATED AT Indianapolis, Indiana, this 6th day of September, 2001.

/s/ Roberto G. Chavarry
Roberto G. Chavarry,
Regional Director
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Region 25
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